

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LORRAINE J. DILLNER)	
Claimant)	
V.)	
)	
SPIRIT AEROSYSTEMS, INC.)	Docket No. 1,063,005
Respondent)	
AND)	
)	
INSURANCE COMPANY OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent requests review of Administrative Law Judge John Clark’s August 29, 2013 preliminary hearing Order. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Erik K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the August 29, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant filed an application for hearing alleging injury to her back and all affected body parts from repetitive lifting from June 2011 and each working day thereafter.

The preliminary hearing Order indicated claimant was injured out of and in the course of her employment in June 2011, and respondent had notice of her work-related injuries.

Respondent appealed on the issues of “compensability/prevaling factor and authorization of medical treatment.”¹ Respondent argues claimant failed to prove that her alleged repetitive trauma from June 2011 and each working day thereafter was the prevailing factor in causing her current condition and need for medical treatment. Rather, respondent asserts that the prevailing factor in claimant’s injury and need for treatment is her preexisting degenerative disc disease.

¹ Respondent’s Application for Review at 1. Respondent’s argument focuses on prevailing factor, which is included in determining if claimant’s injury arose out of her employment. No specific argument is raised regarding whether claimant’s injury occurred in the course of her employment.

Respondent also argues claimant “should not be allowed to unilaterally change her classification of injury to ‘repetitive trauma’ and amend her date of accident to conform to the evidence as it prejudices respondent’s ability to present appropriate defenses.”² In its Reply Brief, respondent asserts claimant’s injury occurred in 2008 or 2009 and notice in June 2011 was untimely. Additionally, respondent argues claimant failed to demonstrate the repetitive nature of her injury by diagnostic or clinical tests.

Claimant argues that the prevailing factor for her current condition and need for medical treatment was her repetitive work. She maintains the Order should be affirmed. Claimant contends Judge Clark conformed the pleadings to match the evidence, such that her work was the prevailing factor in her disability and need for medical treatment.

The issues raised on review are:

- 1) Did claimant sustain personal injury by repetitive trauma that arose out of her employment, and specifically, was claimant’s repetitive trauma the prevailing factor causing her injury and need for medical treatment?
- 2) Did claimant provide timely notice?

FINDINGS OF FACT

Claimant began working as a material technician with Boeing in 1979, and continued with her employment when respondent took over the company in 2005. Her job duties involved repetitive lifting and carrying of skins³ weighing approximately 20 pounds each.

Claimant has a history of low back complaints. Paul Brackeen, D.C., treated claimant from May 8, 2007 forward. Dr. Brackeen consistently diagnosed claimant with misalignment of the lumbar spine, nonallopathic lesions of the lumbar spine and sciatica. As early as July 16, 2007, claimant advised Dr. Brackeen that she experienced low back pain from lifting skins at work.⁴ Over the next couple years, claimant continued to attribute her low back pain to lifting at work.

In June 2011, claimant began experiencing increasing pain in her lower back radiating into the right hip and lower extremity. She indicated there was nothing new about her job in June 2011 that caused her low back condition to worsen. She denied a specific accident, and noted the pain just gradually increased over time.

² Respondent’s Reply Brief (filed Oct. 9, 2013) at 3-4.

³ “Skins” are not defined in the preliminary hearing transcript or exhibits. This Board Member understands that skins are sheet metal panels of varying sizes.

⁴ P.H. Trans., Resp. Ex. 2 at 19, 21, 29, 31, 51, 53, 55, 57, 59, 61, 88, 90, 96, 98.

On March 9, 2012, claimant's primary care physician, Dr. Alvarado, gave claimant temporary work restrictions of no lifting greater than 15 pounds, alternate sitting and standing and no working over eight hours a day.⁵ Claimant testified that Dr. Alvarado advised her, at some unknown time, that her condition "could be work-related."⁶ According to claimant, she told her supervisor, Shawn Collins, in June 2011, that she had a "serious back condition" from repetitively lifting skins at work.⁷

Mr. Collins testified claimant complained of back pain "pretty much every day."⁸ He believed the first time she attributed her complaints to work activities was in "March of 2011 or sooner,"⁹ but acknowledged it could have been in June or July of 2011.¹⁰ Mr. Collins indicated he asked claimant to go to "medical" on several occasions for her back complaints, but she refused for fear of being terminated.

By agreement of the parties, an Order was issued on February 11, 2013 appointing Paul Stein, M.D., to perform an independent medical examination for purposes of a prevailing factor opinion. The parties sent a joint letter to Dr. Stein stating claimant was alleging a back injury from repetitive activities from June 2011 and each and every working day thereafter and requesting his opinion regarding prevailing factor.¹¹

Dr. Stein evaluated claimant on February 28, 2013. He reviewed a lumbar MRI and noted degenerative disease with substantial stenosis at L3-4 and L4-5. Dr. Stein stated:

The description of her work activity given by Ms. Dillner today is consistent with the records from Spirit Aerosystems. Although there were other occasional aggravations to the lower back, the chiropractic records generally reflect aggravation by the work activity. Additionally, this type of activity over time is also likely to accelerate the pace of degenerative disease. Therefore, the pathology causing the symptoms has not only been aggravated by the work activity but caused by it. In my opinion, in this particular situation, it is more likely than not that the symptoms and need for treatment are related to the work activity which is the prevailing factor.¹²

⁵ *Id.*, Cl. Ex. 1 at 1-2.

⁶ *Id.* at 15.

⁷ *Id.* at 17.

⁸ *Id.* at 26.

⁹ *Id.* at 23.

¹⁰ *Id.* at 27.

¹¹ *Id.*, Cl. Ex. 3 at 1.

¹² *Id.*, Resp. Ex. 3 at 5.

The Division of Workers Compensation received Dr. Stein's February 28, 2013 report on March 19, 2013. That very day, respondent's counsel sent a letter to Dr. Stein requesting clarification as to whether claimant's work activities over the years, or her condition since June 2011, was the prevailing factor. In response, Dr. Stein noted that when providing a history, claimant did not relate any specific incident in June 2011, and reported her back pain as "kind of a steady" progression with symptoms going back to about 2007 with increasing pain in 2011. Dr. Stein stated:

The primary and prevailing factor in the current need for medical treatment is the preexisting and previously symptomatic degenerative disease with multiple previous aggravations and not specifically June of 2011 or thereafter.¹³

Claimant was seen at her attorney's request by George Fluter, M.D., on May 23, 2013, with complaints of pain affecting her neck, lower back and right lower extremity, as well as numbness in both hands. Claimant reported that she began experiencing back pain in 2007 from repeatedly lifting and carrying door skins at work. Claimant was diagnosed with low back/right lower extremity pain, lumbosacral strain/sprain, multilevel lumbar discopathy, probable right lower extremity radiculitis, probable sacroiliac joint dysfunction, and probable trochanteric bursitis. In addressing prevailing factor, Dr. Fluter stated:

The prevailing factor for the condition and the need for medical evaluation/treatment is the repetitive work-related activities. These activities are over and above those associated with routine activities of daily living.¹⁴

Dr. Fluter provided temporary restrictions of lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently, as well as bending, stooping, crouching, twisting, squatting, kneeling, crawling, and climbing on an occasional basis. Dr. Fluter recommended medications, x-rays, MRI, intermittent use of a back brace, physical therapy, a TENS unit, injections and/or blocks, and referral to a neurosurgeon and/or orthopedic spine surgeon.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states, "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

¹³ *Id.*, Resp. Ex. 1.

¹⁴ *Id.*, Cl. Ex. 2 at 5.

An employer is liable to pay compensation to an employee who incurs personal injury by repetitive trauma arising out of and in the course of employment,¹⁵ which depends upon the facts peculiar to the particular case.¹⁶

Arising "out of" and "in the course of" employment have distinct meanings:

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁷

K.S.A. 2012 Supp. 44-508 states in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

¹⁵ K.S.A. 2012 Supp. 44-501b(b).

¹⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

¹⁷ *Id.* at 278.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

...

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

K.S.A. 2012 Supp. 44-523(a) states:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

The date of injury by repetitive trauma is a legal fiction¹⁸ and is determined by statute.¹⁹

The Kansas Supreme Court has stated that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading so that a correct decision may be reached by the shortest and quickest possible route.²⁰

On appeal from a preliminary hearing, the Board may review only allegations that an administrative law judge exceeded his or her jurisdiction,²¹ including: (1) whether the worker sustained an accident, repetitive trauma or resulting injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice; and (4) whether certain other defenses apply.²² "Certain defenses" are defenses going to the compensability of the injury.²³

ANALYSIS

Claimant alleged repetitive trauma from June 2011 and each working day thereafter, even though she did repetitive work for respondent from 2005 forward and for respondent's predecessor since 1979. She never alleged a specific accident occurring in June 2011. For reasons unknown, claimant artificially limited the time period in which she was injured. However, the date of injury due to repetitive trauma is a legal fiction, not controlled by the pleadings. Claimant's written allegation, by itself, does not make for a legal conclusion and it is not a binding stipulation. Date of injury by repetitive trauma, by the terms of K.S.A. 2012 Supp. 44-508(e), does not include what a claimant lists on an application for hearing.

Insofar as respondent is asserting notice was untimely, this Board Member must determine claimant's date of injury by repetitive trauma.

¹⁸ *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011) ("[D]esignation of an accident date in a repetitive use case is not a factual determination of the precise moment at which the claimant suffered the personal injury. . . . [A]ssignment of any single date as the "accident date" for a repetitive use/cumulative traumas injury is inherently artificial and represents a legal question, rather than a factual determination."); see also *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

¹⁹ K.S.A. 2012 Supp. 44-508(e).

²⁰ *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 205, 756 P.2d 438 (1988).

²¹ K.S.A. 2012 Supp. 44-551(i)(2)(A).

²² K.S.A. 2012 Supp. 44-534a(2).

²³ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

In this case, K.S.A. 2012 Supp. 44-508(e)(1) and (2) do not determine claimant's date of injury by repetitive trauma. Claimant was not taken off work by a physician due to diagnosed repetitive trauma. While she was given restrictions by Dr. Alvarado on March 9, 2012, the file contains no indication such restrictions were due to "diagnosed repetitive trauma," as is statutorily required.

Respondent argues the date of injury by repetitive trauma, using the third consideration in K.S.A. 2012 Supp. 44-508(e), is 2008 or 2009 because claimant was advised in 2008-09 by "Dr. Brackeen, [her] personal physician," that her condition was due to lifting at work.²⁴ The evidence shows claimant's complaints to Dr. Brackeen, her chiropractor, were that her work caused her injury. However, determination of date of injury by repetitive trauma is not based on claimant's belief or her opinions regarding causation. Insufficient evidence exists that claimant was advised by a physician that her condition was work related until she received Dr. Stein's February 28, 2013 report.

This Board Member finds the date of injury by repetitive trauma to be when claimant received Dr. Stein's February 28, 2013. More likely than not, claimant received such report on March 19, 2013, the same day that the Division received Dr. Stein's report on March 19, 2013 and when respondent sent Dr. Stein a letter to reassess or clarify his opinion regarding prevailing factor. Claimant's date of injury by repetitive trauma is based on Dr. Stein advising claimant that she had a work-related condition.

Insofar as claimant still works for respondent and the statute seeks the earliest triggering event to determine date of injury by repetitive trauma, the fourth statutory consideration is irrelevant.

This Board Member adopts the opinions of both Drs. Stein and Fluter that claimant's repetitive work was the prevailing factor in causing her repetitive injury and need for medical treatment. This Board Member concludes that the physical examinations performed by Drs. Stein and Fluter suffice as diagnostic or clinical testing to demonstrate a repetitive injury.²⁵

Regarding notice, Mr. Collins was aware claimant was attributing her low back pain from lifting skins in March 2011 or even earlier. Thus, respondent had actual knowledge of claimant's ongoing injury, even before her legal date of injury by repetitive trauma.

²⁴ Respondent's Reply Brief (filed Oct. 9, 2103) at 3.

²⁵ See *Goodson v. Goodyear Tire & Rubber Co.*, No. 1,057,615, 2012 WL 369788 (Kan. WCAB Jan. 20, 2012) ("A physical examination is essentially a diagnostic test.").

To avoid any misunderstanding, this Board Member is not conforming the pleadings to the evidence. While "variance [from claimed date of injury] is fatal if employer is required to defend against an award for an unknown injury[,]"²⁶ respondent was not forced to defend against an unknown injury. Respondent was aware that claimant was alleging a new law claim based on repetitive trauma. The date of injury by repetitive trauma is a legal fiction. Both parties litigated the case as a new law claim.

The real question is whether Dr. Stein's opinions are limited to viewing claimant's repetitive injuries as occurring from June 2011 forward, as alleged in claimant's application for hearing, or whether Dr. Stein may properly consider claimant's repetitive work without being confined to an artificial beginning date. Dr. Stein's analysis under the former parameters point toward a non-compensable case, as the great bulk of claimant's many years of repetitive employment would be the prevailing factor in her injury and not her work only from June 2011 forward. This Board Member is not limiting claimant's date of injury by repetitive trauma to the allegations listed in her application for hearing. The artificial constraint of only considering injury from June 2011 forward ignores the reality that claimant's injury occurred both before and after June 2011. Her date of injury by repetitive trauma is on or about March 19, 2013, based on applying K.S.A. 2012 Supp. 44-508(e). This date of injury by repetitive trauma could change based on additional evidence.

No argument was presented regarding medical treatment. Any such argument is abandoned.²⁷ In any event, such issue is not appealable from a preliminary hearing.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes:

- claimant's date of injury by repetitive trauma is on or about March 19, 2013;
- claimant's injury by repetitive trauma arose out of her employment, including that her repetitive work was the prevailing factor in causing her injury, medical condition and need for medical treatment;
- respondent had actual knowledge of claimant's injury, such that notice requirements in K.S.A. 2012 Supp. 44-520(a) were waived; and
- the repetitive nature of claimant's injury was demonstrated by physical examinations performed by Drs. Stein and Flutter.

²⁶ *Pyeatt*, supra, 243 Kan. at 206.

²⁷ See *Herrell v. Nat'l Beef Packing Co.*, LLC, 292 Kan. 730, 736, 259 P.3d 663 (2011).

WHEREFORE, the undersigned Board Member affirms the August 29, 2013 Order regarding the determination of issues of arising out of and in the course of employment, the former of which includes the prevailing factor requirement, and timely notice. Date of injury by repetitive trauma is modified from June 2011 to on or about March 19, 2013 or the actual date claimant received Dr. Stein's February 28, 2013 report or when a physician first advised claimant that her condition was work related.²⁸

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Eric Kuhn
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Honorable John D. Clark

²⁸ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.